LIBRARY
SUPREME COURT, U.S.

In the Supreme Court of the United States

OCTOBER TERM 1966

Office-Supreme Court, U.S.
FILED
JAN 26 1967
JOHN F. DAVIS, CLERK

No. 863

SHELL OIL COMPANY,
Appellant,

vs.

STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA, et al,
Appellees.

On Appeal from the Supreme Court of the State of California

Motion to Dismiss or Affirm

THOMAS C. LYNCH
Attorney General

JAMES E. SABINE
Assistant Attorney General

ERNEST P. GOODMAN
Assistant Attorney General

JOHN J. KLEE, JR.
Deputy Attorney General

6000 State Building
San Francisco, California 94102

Attorneys for Appellees

BORG PRINTING COMPANY OF CALIFORNIA, 348 FIRST STREET, SAN FRANCISCO 94105

SUBJECT INDEX

	Page
Summary of Appellees' Position	1
Statement of the Case	4
This Appeal Does Not Present a Substantial Federal Question	5
I. Taxation of the Sales of Bunker Fuel to Vessels for Use as Fuel Supplies Does Not Violate Article I, Section 10, Clause 2, of the Federal Constitution (the "Import-Export" Clause)	5
II. Taxation of the Gross Receipts of a Retailer Arising from the Sale of Fuel to Vessels Engaged in Foreign Commerce Is Not Barred by the "Import-Export" Clause as a Tax on a "Step in the Process of Exportation"	11
III. The Tax Here Involved Does Not Violate Article I, Section 8, Clause 3 of the United States Constitution (the Commerce Clause)	16
IV. The Federal Government Has Not "Occupied the Field" of Taxation of Local Retailers of Domestically Produced Bunker Fuel	18
Conclusion	22

TABLE OF AUTHORITIES CITED

Cases	Pages
Canton Railroad Co. v. Rogan, 340 U.S. 511	3, 8, 11, 13
Department of Treasury v. Wood Preserving Corp., 313 U.S. 62	16, 17
Eastern Air Transport v. Tax Comm., 285 U.S. 147	17
Edelman v. Boeing Air Transport, 289 U.S. 249	17
Fairbank v. United States, 181 U.S. 283	13
Foppiano v. Speed, 199 U.S. 501	3, 17
Freeman v. Hewit, 329 U.S. 249	18
General Motors v. Washington, 377 U.S. 436	3, 18
Graves, et al v. New York, ex rel O'Keefe, 306 U.S. 466	16
Gulf Oil Corp. v. McGoldrick, 282 N.Y. 612	10
Hays v. Pacific Mail SS Co., 17 How. 596	14, 17
Helvering v. Gerhardt, 304 U.S. 405	16
International Harvester Co. v. Department of Treasury, 322 U.S. 340	17
McGoldrick v. Compagnie Generale, 309 U.S. 430	16
McGoldrick v. Gulf Oil Corp., 309 U.S. 414	4, 19, 20, 21
Mintz v. Baldwin, 289 U.S. 346	19
Miller Bros. Co. v. Maryland, 347 U.S. 340	18
Nashville, C. & St. L. Ry. v. Wallace, 288 U.S. 249	17
National Sugar Refining Company v. United States, 161 F. Supp. 606 (Ct. Claims, 1958)	7
Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450	18
Pacific States Cast Iron Pipe Co. v. State Tax Commission, (Utah) 369 P.2d 123, rev'd per curiam, 372 U.S. 605	17
Peck & Co. v. Lowe, 247 U.S. 165	14
Puget Sound Stevedoring Co. v. Tax Comm., 302 U.S. 90	2, 8

Pages

Richfield Oil Corp. v. State Board, 329 U.S. 69 ..... 6, 8, 9, 10

Scandinavian Airlines System, Inc. v. County of Los Angeles, 56 Cal. 2d 11 14
Society for Savings v. Bowers, 349 U.S. 143 16
Southern Pac. Co. v. Gallagher, 306 U.S. 167 ..... 17, 18
Swan and Finch Company v. United States, 190 U.S. 143 ..... 2, 6, 7, 8, 9

Thames & Mersey Ins. Co. v. United States, 237 U.S. 19 13

United States v. Hvoslef, 237 U.S. 1 ..... 12, 13

Werner Co. v. Director of Taxation, 350 U.S. 492 16
West India Oil Co. v. Sancho, 108 F.2d 144 (CCA, 5th) aff'd on other grounds 311 U.S. 20 7

STATUTES

California Revenue and Taxation Code, Section 6051 1
19 U.S.C. § 1309 19
46 U.S.C. §§ 12, et seq 14
Internal Revenue Code:
§ 3422 19
§ 3101 15
§ 3111 15
§ 3121(b) 15
§ 3451 19

TEXT

48 Am. Jur., Shipping § 65D 14

CONSTITUTION

United States Constitution:
Article I, Section 8, Clause 3 16
Article I, Section 10, Clause 2 5

In the Supreme Court of the United States

OCTOBER TERM 1966

No. 863

SHELL OIL COMPANY,
Appellant,

vs.

STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA, et al,
Appellees.

On Appeal from the Supreme Court of the State of California

Motion to Dismiss or Affirm

Appellee, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, hereby moves the Court to dismiss this appeal or to affirm the decision of the California Supreme Court for the following reason:

The case does not present a substantial federal question.

SUMMARY OF APPELLEES' POSITION

In this suit, appellant sought a refund of sales tax which it reported and paid to the State of California[1] with respect

1. The California Sales Tax is a privilege tax of general application imposed on all retailers in the State of California, measured by the gross receipts from their sales of tangible personal property. (California Revenue and Taxation Code, section 6051.)

to sales of bunker fuel delivered and placed in the purchasing vessels' fuel tanks in California and used to propel such vessels on the high seas. The California Supreme Court concluded that there was no merit to the variety of constitutional arguments made by appellant and upheld the validity of the tax.

Appellant, without support in reason or authority, is seeking to upset established legal principles and to restrict the taxing powers of the state and federal governments by the creation of constitutional immunities never before recognized by this Court. This is readily apparent from the following statement of appellant's contentions, which is accompanied by a summary of our response thereto.

1. Appellant's first argument is based on Article I, section 10, clause 2 (the Import-Export Clause) of the federal constitution, which prohibits state taxation of imports and exports. Appellant argues that fuel used on the high seas is an "export" within the meaning of that constitutional provision and the sale thereof is thus immune from taxation if the vessel to which the fuel is sold is either foreign owned or domestically owned and headed for a foreign port. That contention was considered and rejected in *Swan and Finch Company v. United States,* 190 U.S. 143, wherein this Court stated that fuel supplies are not exports within the meaning of the United States Constitution. Appellant does not attempt to distinguish the *Swan and Finch* case but argues that this Court's statement in that regard was merely a "gratuitous and uncalled for remark." Also relevant is *Puget Sound Stevedoring Co. v. Tax Comm.,* 302 U.S. 90, 94, wherein this Court referred to the taxability of ship's chandlers.

2. Again basing its contention on the Import-Export Clause, appellant next argues that any tax which effects

an "economic burden" on the movement of goods "beyond the water's edge" in foreign commerce is unconstitutional as a tax on the "process of exportation." That argument is answered by *Canton Railroad Co. v. Rogan,* 340 U.S. 511, wherein this Court analyzed the cases relied on by appellant as holding invalid only those taxes which are equivalent to a direct tax on the exported articles themselves. There is no factual, or even theoretical, basis upon which it can be said that a tax on the seller of fuel to a vessel operator is the equivalent of a direct tax on the export cargo, if any, on the vessel at the time the fuel is loaded.

3. Appellant next suggests that the imposition of the tax here involved is barred by the Commerce Clause. In this regard, appellant argues that the delivery of the fuel occurred outside of California despite the fact that all deliveries were made within the territorial limits of California. Appellant's theory in this regard appears to be that a vessel whose port of registry is not in California is really a little piece of another state or country. Appellant's contention is answered by *Foppiano v. Speed,* 199 U.S. 501, in which this Court expressly considered and rejected that theory. In addition, appellant attempts to raise a "multiple burden" argument. That contention is answered by *General Motors v. Washington,* 377 U.S. 436 in which this Court held that a "multiple burden" argument will not be considered by this Court unless multiple burden in a constitutional sense is actually present in the case before this Court. It has been expressly stipulated in the instant case that no other jurisdiction has attempted to impose a tax on any of the sales of fuel here involved.

4. Finally, appellant argues that when Congress exempted items sold as ship's stores from the federal manu-

facturers' excise and import taxes, it intended to pre-empt the field and to prohibit any state taxes on ship's stores. In making this argument, appellant misconstrues the decision of this Court in *McGoldrick v. Gulf Oil Corp.*, 309 U.S. 414, in which this Court made clear that any implied prohibition of state taxation by the federal government was in the area of protection of imports which had remained under federal bond and had never become part of the mass of goods in the taxing state.

STATEMENT OF THE CASE

Appellant is a Delaware corporation whose principal business is the exploration for and production of crude oil and the refining and marketing of petroleum products. Appellant is engaged in business in California as a retailer of petroleum products and holds a seller's permit as required by the California Revenue and Taxation Code.

As a part of its retail sales business, appellant sold and delivered unbonded bunker fuel to vessels at appellant's facilities here in California. Some of these sales were to vessels of foreign registry or to vessels of domestic registry engaged in foreign or interstate commerce. None of the fuel here in question was delivered to the vessels as cargo. All the fuel here involved was placed on board the vessel as the vessel's fuel supply and was actually used by the vessel as its source of power.

In its sales and use tax return filed with the California State Board of Equalization for the period here involved, appellant included in the measure of its sales tax the gross receipts from its sales of bunker fuel sold to vessels as fuel. The tax, as self-assessed, was timely paid. Within the time allowed by law, appellant filed a claim for refund of the tax paid with respect to those sales of bunker fuel which were to vessels of foreign registry or to vessels of

domestic registry engaged in interstate or foreign commerce. The State Board of Equalization denied the claim and appellant brought this suit for refund.

The trial court rejected all of appellant's contentions. The California District Court of Appeal, an intermediate appellate court of appeal, rejected all of appellant's contentions except the "process of exportation" argument. Appellant did not petition for a hearing in the California Supreme Court respecting the issues decided adversely to it. However, the California Supreme Court granted a hearing at the request of appellees and rejected appellant's arguments on all of the issues here involved.

Appellant's statement of facts is not accurate in a number of particulars. Appellant states that all the contracts to supply the fuel here involved were executed outside California. That is not true. The contract with Ocean Prince, Inc., was executed in California (Clerk's Transcript, p. 17).

Appellant states that each ship took on cargo at the California port at which it took on fuel. That is not true. Three of the eight vessels involved in this litigation, to wit, the *Ocean Prince,* the *S.S.O.M. Bermuth,* and the *S.S. Panagiotis Coumantaros,* did not load cargo when they purchased fuel in California (Clerk's Transcript, pp. 32, 33.)

THIS APPEAL DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION

I. Taxation of the Sales of Bunker Fuel to Vessels for Use as Fuel Supplies Does Not Violate Article I, Section 10, Clause 2, of the Federal Constitution (the "Import-Export" Clause).

Article I, Section 10, Clause 2 of the United States Constitution provides that no State shall, without the consent of Congress, "lay any Imposts or Duties on Imports or Exports." That provision, commonly called the "Import-Export" Clause, prohibits any state tax upon an item

which is an "export" once the item has begun the "process of exportation." (*Richfield Oil Corp. v. State Board,* 329 U.S. 69.)

This Court, in *Swan and Finch Company v. United States,* 190 U.S. 143, held that items of ship's stores and fuel supplies sold or delivered to vessels destined for foreign ports to be consumed on the voyage are not "exports" as that term is used in the United States Constitution. The *Swan and Finch* case involved an importer, manufacturer, and exporter of oils. The lubricating oil there involved was manufactured out of imported rape seed oil upon which import duties had been paid. The federal statute then in force allowed the manufacturer a drawback of the import duties upon the "exportation" of the imported goods. The manufacturer sold some oil to vessels bound for foreign ports to be consumed by the vessels as lubricating oil during their voyage. The manufacturer claimed a drawback for the oil so sold. The Treasury Department denied the claim on the basis that oil sold as ship's stores is not an "export." The manufacturer brought an action in the Court of Claims, which also held that the oil was not an "export." The manufacturer took an appeal to this Court, which, after stating the facts announced:

> "The statute allows the drawback 'on the exportation,' and the question is whether goods placed on board a vessel bound for a foreign port, to be used and consumed on board the vessel during its voyage, and in fact so used and consumed, are exported.
>
> "The careful opinion of the Court of Claims, which in general we approved and to which we refer, relieves us from the necessity of an extended discussion. *Whatever primary meaning may be indicated by its derivation, the word 'export' as used in the Constitution and laws of the United States, generally means the transportation of goods from this to a foreign country.* 'As

the legal notion of emigrating is a going abroad with an intention of not returning, so that of exportation is a severance of goods from the mass of things belonging to this country with an intention of uniting them to the mass of things belonging to some foreign country or other.' 17 Ops.Attys.Gen. 583.

"True, the context may sometimes give to the word a narrower meaning, and in the execution of the administrative affairs of government it may have been applied to cases in which there was not in the full sense of the term an exportation, yet these are exceptions and do not destroy its general signification. It cannot mean simply a carrying out of the country, for no one would speak of goods shipped by water from San Francisco to San Diego, as 'exported,' although in the voyage they are carried out of the country. Nor would the mere fact that there was no purpose of return justify the use of the word 'export.' Coal placed on a steamer in San Francisco to be consumed in propelling that steamer to San Diego would never be so designated. *Another country or State as the intended destination of the goods is essential to idea of exportation.*" (190 U.S., 144-145) (Emphasis added.)

Both the Court of Claims and this Court declared that in the statute there under consideration the word "export" was used in its Constitutional sense and that items sold to vessels bound for foreign ports as ship's stores and fuel supplies are not exports within the meaning of the Constitution or the statute since they are not destined for a foreign country.

The *Swan and Finch Company* case is not an isolated decision. The principle it established has been followed by other courts. *West India Oil Co. v. Sancho,* 108 F.2d 144 (CCA, 5th) aff'd on other grounds 311 U.S. 20; *National Sugar Refining Company v. United States,* 161 F. Supp. 606 (Ct. Claims, 1958).

In addition, later decisions of this Court have enunciated a definition of "export" consistent with the holding of *Swan and Finch Company*. In *Richfield Oil Corp. v. State Board, supra,* the question to be determined was when did the oil, which was delivered to the vessel as cargo and conceded to be an export, begin the export journey. This Court nevertheless recognized the requirement of an intended foreign destination since it prefaced a portion of its opinion by stating:

> "The requirement that foreign commerce be involved (*Woodruff v. Parham,* 8 Wall. 123, 136) is met for concededly the oil was sold for shipment abroad. The question whether at the time the tax accrued the oil was an export presents a different problem." (329 U.S. at page 78).

In *Canton R. Co. v. Rogan,* 340 U.S. 511, this Court stated, at page 515:

> "To export means to carry or send abroad; . . ."

Thus, it has been established by this Court that items sold or delivered to vessels as fuel supplies or ship's stores to be consumed on the voyage are not "exports" within the meaning of the Constitutional prohibition of taxation of "exports." This result is consistent with *Puget Sound Stevedoring Co. v. Tax Comm.,* 302 U.S. 90, 94, in which this Court indicated that a ship's chandler was a local business, distinct from the commerce it serves and subject to taxation free of constitutional limitations.

Appellant's lengthy discourse on the issue is nothing more than an attempt to have this Court ignore the principles already established by this Court. Thus, apparently recognizing that the *Swan and Finch Company* decision is directly contrary to its position in this case, appellant does not attempt to distinguish the case but merely asserts

that the statements in the opinion should be ignored as "gratuitous and uncalled for remarks." We do not believe that the *Swan and Finch Company* decision should be so lightly brushed off.

The *Swan and Finch Company* case is the only case in which this Court was squarely faced with the question of whether items delivered to a vessel as ship's stores were exports. This Court clearly and emphatically stated that the word "export" was used in the statute there under consideration *in its Constitutional sense* and, as used *in the Constitution,* did not include items delivered to vessels as ship's stores. This Court's statement that ship's stores are not exports within the meaning of the Constitution was not mere dictum, as appellant would lead us to believe, but was a necessary part of its decision in view of its conclusion that "export" in the statute had the same meaning as in the Constitution.

There is no reason for overruling or rejecting the analysis of the *Swan and Finch Company* decision. The opinion was based on the rationale that, in its generally understood meaning, the word "exports" refers to items that are shipped from this country destined for a foreign country, not items that, although they are leaving this country, have no foreign destination. That point is as valid today as it was when it was initially pronounced by this Court.

Appellant's other arguments are likewise untenable. For example, appellant asserts that as to vessels of foreign registry, the fuel has a destination in a foreign country even though it will be consumed on the high seas. (Juris. St. page 12) The rationale behind that rather novel assertion is the contention that delivery to a foreign vessel here in California is equivalent to delivery abroad. There is absolutely no support for that proposition. In fact, *Richfield Oil Corp. v. State Board, supra,* is direct authority to

the contrary. In *Richfield,* this Court was faced with the question of whether the oil there involved was in the export process at the time it was delivered here in California to the vessel of foreign registry. This Court held that it was and stated,

> "That delivery marked the *commencement* of the movement of the oil abroad." (Emphasis added.) 329 U.S., 83.

If appellant were correct (i.e., if delivery to a vessel of foreign registry is equivalent to delivery abroad), then this Court would have stated that the delivery *ended* the journey abroad. By stating that the export journey *commenced* in California, this Court certainly indicated that the journey ended in New Zealand, where the oil was finally unloaded from the vessel.

Moreover, it would be a poor policy, indeed, that would lead to the result that fuel oil supplied to a vessel of foreign registry would be an export whereas similar fuel oil supplied to a vessel of domestic registry engaged in identical trade would not be an export. It is hard to imagine that the framers of the Constitution intended such outright discrimination against domestic companies.

The difficulty faced by appellant in finding support for its position is underlined by its attempt to rely on *Gulf Oil Corp. v. McGoldrick,* 282 N.Y. 612. That case actually held that fuel in bond was protected as an "import." This Court in affirming, at 309 U.S. 414, did not rely on the import-export clause. As a matter of fact, at page 428 of its decision, this Court stated, when discussing the drawback statute, that goods may be "exported or otherwise sent out of the country." This statement would appear inconsistent with the argument here advanced by appellant that leaving the country and exportation are synonymous.

II. Taxation of the Gross Receipts of a Retailer Arising from the Sale of Fuel to Vessels Engaged in Foreign Commerce Is Not Barred by the "Import-Export" Clause as a Tax on a "Step in the Process of Exportation."

Appellant asserts that, even if the fuel is not itself an export, the present tax is nevertheless unconstitutional for the reason that the Import-Export Clause prohibits any tax which creates an "economic burden" on the movement of goods "beyond the water's edge." The cases relied on by appellant do not support or even suggest such a standard.

The limits of immunity of the Import-Export Clause are set forth by this Court in *Canton R. Co. v. Rogan,* 340 U.S. 511, this Court's latest pronouncement on the subject. In *Canton R. Co.,* the taxpayer attacked as unconstitutional under the Import-Export Clause a Maryland franchise tax, measured by gross receipts, insofar as the gross income by which the tax was measured included revenues derived from the handling of goods bound for exportation. This Court rejected the taxpayer's contentions and stated, beginning at page 513, that:

> "If this were a tax on the articles of import and export, we would have the kind of problem presented in *Spalding & Bros. v. Edwards,* 262 U.S. 66; *Richfield Oil Corp. v. State Board,* 329 U.S. 69; *Hooven & Allison Co. v. Evatt,* 324 U.S. 652; and *Joy Oil Co. v. State Tax Comm'n,* 337 U.S. 286. But the present tax is not on the articles of import and export; *nor is it the equivalent of a direct tax on the articles,* as was held to be true of stamp taxes on foreign bills of lading (*Fairbank v. United States,* 181 U.S. 283), stamp taxes on charter parties in foreign commerce (*United States v. Hvoslef,* 237 U.S. 1); and stamp taxes on policies insuring exports against maritime risks. *Thames & Mersey Ins. Co. v. United States,* 237 U.S. 19. It is true that the latter cases indicated that the

prohibition of the Import-Export Clause against taxes on imports and exports involves more than an exemption from taxes laid upon the goods themselves. Moreover, *Crew Levick Co. v. Pennsylvania,* 245 U.S. 292, following the reasoning of *Brown v. Maryland,* 12 Wheat. 419, 444-445, gave like immunity to the business of selling goods in foreign commerce when gross receipts were taxed. Cf. *Anglo-Chilean Corp. v. Alabama,* 288 U.S. 218. Though appellant is not engaged in the import-export business, it claims that its handling of goods, which are destined for export or which arrive as imports, is part of the process of exportation and importation. In support of the argument it refers to language in *Spalding & Bros. v. Edwards, supra,* and *Richfield Oil Corp. v. State Board, supra,* relative to when the export process starts; and it argues that, if the baseballs and the baseball bats in *Spalding* and the oil in *Richfield* were immune from the sales taxes because those commodities had been committted to exportation, the same immunity should be allowed here since the goods handled by appellant were similarly committed. The difference is that in the present case the tax is not on the goods but on the handling of them at the port. *An article may be an export and immune from a tax long before or long after it reaches the port. But when the tax is on activities connected with the export or import the range of immunity cannot be so wide."* (Emphasis added.)

Thus, the principle established by this Court is that a tax, although not directly imposed on the export cargo itself, will be in violation of the constitutional prohibition against taxing exports if the tax can logically be found to be the equivalent of a direct tax on the export cargo.

Appellant, to support its argument for an "economic burden" plus "spatial limitation" test, relies chiefly on three early decisions of this Court, to wit, *United States v. Hvos-*

lef, 237 U.S. 1; *Fairbank v. United States*, 181 U.S. 283; and *Thames & Mersey Ins. Co. v. United States*, 237 U.S. 19. Those cases, however, do not support the rule which appellant urges upon this Court. To the contrary, a careful reading of those cases shows that, as stated in *Canton R. Co. v. Rogan, supra*, this Court has held invalid as a tax on the "process of exportation" only those taxes which have been found to be the *equivalent of a direct tax on exported articles themselves*. This Court carefully pointed out that the documents on which the stamp tax was imposed, such as the bill of lading (*Fairbanks*) and the marine insurance policy (*Thames & Mersey*), were needed by the exporter to meet commercial requirements for the sale of the cargo, while the type of charter party involved in the *Hvoslef* case was considered by this Court to be the equivalent of a contract for the carriage of goods. It is significant that in each of these cases the stamp tax was being imposed on a contractual or property right acquired by the *exporter himself* and involved an essential step in conducting his exporting activities.

As declared by this Court in the quotation from the *Canton R. Co.* case set forth above, the taxes involved in those cases were found to be "equivalent to a direct tax on the articles" of cargo. Appellant has not cited, and we have not discovered, any case (from this Court or any other tribunal) which has held a tax invalid merely on the basis that it increases the cost of moving goods on the high seas, i.e., "beyond the water's edge."

The taxes involved in the cases relied on by appellant are not in the least analogous to the tax here under consideration. Certainly the sales tax imposed upon the retailer of fuel to the vessel is not the "equivalent of a direct tax on the articles" which constitute the vessel's cargo. It

seems apparent that the amount of fuel purchased by a vessel in any particular port bears no relation whatsoever to the amount of or value of cargo, if indeed there even is any cargo, on the vessel at the time of purchase. At the most, the present tax affects exportation only indirectly and remotely, and as such, is constitutional (*Peck & Co. v. Lowe*, 247 U.S. 165).

An examination of some of the various state and federal taxes that are clearly allowable reveals there is no mechanistic rule against any tax which increases the cost of moving goods beyond the water's edge. For example, it is a fundamental rule of taxation that the "home port" or port of registry of ocean-going vessels engaged in interstate and foreign commerce can impose an *ad valorem* property tax on the vessel (*Hays v. Pacific Mail SS Co.*, 17 How. 596; see discussion of "home port" doctrine in *Scandinavian Airlines System, Inc. v. County of Los Angeles*, 56 Cal. 2d 11, 19-22). Surely an *ad valorem* tax on the vessel itself more directly increases the shipowner's cost of doing business than does a tax imposed upon retailers of fuel oil. Yet appellant must concede that such a property tax does not violate the Import-Export Clause.

The federal government, although subject to the same restrictions respecting the taxation of exports as are the states, has, since the beginning of our country, imposed tonnage duties and "light money" duties on certain vessels entering United States ports from foreign ports (46 U.S.C. §§ 12, et seq.; see general discussion and cases cited in 48 Am. Jur., Shipping § 65D). This clearly constitutional charge on operators of vessels engaged in foreign commerce certainly increases the cost of moving goods in commerce.

The federal government also imposes taxes on employees and employers based on the gross wages paid

the employee by the employer. (On employee—I.R.C. § 3101; on employer—I.R.C. § 3111.) These taxes apply to seamen employed on domestic vessels if the contract of employment was entered into in the United States (I.R.C. § 3121(b)). The tax on the ship operator measured by the gross wages paid its employees even more directly operates to increase the ship operator's cost of doing business than does a tax on the retailer of fuel. Yet these federal taxes, collected to offset the cost of the various federal "social security" programs, clearly are not taxes on the "process of exportation."

These examples demonstrate that, contrary to appellant's contention, not every tax which relates to matters "beyond the water's edge" is unconstitutional. The tax in question must still, in order to be held in violation of the Import-Export Clause, be the equivalent of a direct tax on the articles of export themselves. Since the present tax is not a tax which can be said to be the equivalent of a direct tax on the exported articles themselves, it is clearly outside the scope of the tax immunity granted by the Import-Export Clause of the federal Constitution.

To support its "process of exportation" argument, appellant makes the bold assertion that the California tax on sellers of fuel oil is passed on pro-rata to the customers of the vessels which purchase the fuel. Appellant has neither produced any evidence nor cited any authority whatsoever to support that contention. Indeed, there is no authority or evidence to support the contention for appellant's assertion in that regard is mere speculation. In appellees' Petition for Hearing before the Supreme Court of the State of California, there is discussed at great length the many economic factors that go into the setting of shipping rates, such as the elasticity of supply

and demand respecting both goods to be shipped and the ships themselves, together with the cartel type rate setting agreements which pervade the shipping industry. It is just this type of speculation on tax burden which this Court has wisely avoided when ruling on the constitutionality of taxes. See *Graves, et al v. New York, ex rel O'Keefe,* 306 U.S. 466, 484; *Helvering v. Gerhardt,* 304 U.S. 405, 412-415; *Werner Co. v. Director of Taxation,* 350 U.S. 492, 494; *Society for Savings v. Bowers,* 349 U.S. 143.

Moreover, in the present case there certainly is no evidence to support the assertion that the present tax was borne by the vessel's customers. Although appellant has stipulated that any recovery it receives in this case will be returned to the vessel operators, there is a conspicuous lack of any statement that the vessel operators will in turn make refunds to their customers.

It is respectfully submitted, therefore, that there is no merit to the contention that the present tax is a tax on the "process of exportation." By no stretch of the imagination can a tax on the sale of fuel to a vessel be said to be the equivalent of a tax on the vessel's export cargo—especially in a case such as this where three of the eight vessels did not even have any export cargo on board when they left California ports.

III. The Tax Here Involved Does Not Violate Article I, Section 8, Clause 3 of the United States Constitution (the Commerce Clause).

It is clearly established that a sales tax imposed upon those sales of a local retailer that are made to purchasers who take delivery in the taxing state does not violate the Commerce Clause even though the purchaser immediatley takes or ships the goods to another state or country. *McGoldrick v. Compagnie Generale,* 309 U.S. 430; *Department*

of Treasury v. Wood Preserving Corp., 313 U.S. 62; *International Harvester Co. v. Department of Treasury*, 322 U.S. 340; *Pacific States Cast Iron Pipe Co. v. State Tax Commission*, (Utah) 369 P.2d 123, rev'd per curiam, 372 U.S. 605).

Appellant fails to make any mention whatsoever of these cases but simply assumes as a matter of fact that delivery took place outside California. In that respect, appellant ignores the stipulated fact that all deliveries were actually made within the territorial limits of California but bases its assumption on the rule that, for property tax purposes, the situs of a vessel engaged in commerce on the high seas is presumed to be at the vessel's port of registry, or "home port." (*Hays v. Pacific Mail Steamship Co.*, 17 How. 596) There is absolutely no authority whatsover for extending that fiction to sales tax cases so as to say that sales to vessels here in California really took place in some other state or country. As a matter of fact, in *Foppiano v. Speed*, 199 U.S. 501, this Court expressly rejected the argument that sales made on board a vessel were to be regarded as occurring where the vessel was registered.

Furthermore, it has been firmly established by this Court that the Commerce Clause does not prohibit the taxation of the sale simply because *the subject of the sale* (here bunker fuel) is to be used by the purchaser in conjunction with its interstate or foreign commerce business. Any burden imposed on interstate or foreign commerce by taxing the sale has been held to be too indirect and remote to warrant Commerce Clause protection. *Eastern Air Transport v. Tax Comm.*, 285 U.S. 147; *Nashville, C & St. L. Ry. v. Wallace*, 288 U.S. 249; *Edelman v. Boeing Air Transport*, 289 U.S. 249; *Southern Pac. Co. v. Gallagher*, 306 U.S. 167.

Appellant's attempt to raise a "multiple burden" argument must also fail. No other state or country has even attempted to tax the sales involved in this litigation (CT 22). Accordingly, no "multiple burden" can be said to exist.

It is not enough to show the possibility of multiple taxation. Actual "multiple burden" must be shown to exist (*General Motors v. Washington,* 377 U.S. 436; *Southern Pac. Co. v. Gallagher,* 306 U.S. 167, 172; *Northwestern States Portland Cement Co. v. Minnesota,* 358 U.S. 450).

But even assuming, for the sake of argument, that appellant could raise the issue of "multiple burden" without the necessity of showing actual multiple taxation, appellant's argument would still fail for there is not even the remotest possibility of multiple taxation in this case. Any other state's attempt to tax these local California sales would violate both the Commerce Clause and the Due Process Clause (see *Freeman v. Hewit,* 329 U.S. 249; *Miller Bros. Co. v. Maryland,* 347 U.S. 340). The sales here involved were purely local California sales. It defies logic to argue that any other state could impose an excise tax upon appellant on the hypothesis that appellant made sales in that other state.

IV. The Federal Government Has Not "Occupied the Field" of Taxation of Local Retailers of Domestically Produced Bunker Fuel.

As its final attempt to avoid the California sales tax, appellant argues that Congress, in exercise of its power to regulate interstate and foreign commerce, has "occupied the field" of sales taxation of bunker fuel and impliedly prohibited such a state tax.

There is not now, and there never has been, any federal statute purporting to prohibit a state from imposing its

sales tax on local retailers of fuel. Appellant's arguments on "occupation of the field" and "preemption" are founded on the contention that Congress has impliedly (by silence on the subject) prohibited a state tax on local retailers of domestically produced bunker fuel. On that point, appellant bears a heavy burden, for prohibition by implication will not be lightly found. *Mintz v. Baldwin,* 289 U.S. 346, 350.

It is clear that Congress has not "occupied the field" so as to impliedly declare that states may not impose a sales tax on local retailers of domestically produced fuel. Although stating that this area has been the subject of a comprehensive pattern of federal regulation, appellant has failed to cite even one Congressional enactment dealing with the taxation or regulation of retailers of domestically produced bunker fuel. Appellant, however, places its reliance upon section 3451 of the 1939 Internal Revenue Code and the related customs duty drawback provision found in 19 U.S.C. 1309, together with the case of *McGoldrick v. Gulf Oil Corp.,* 309 U.S. 414.

Section 3451 of the Internal Revenue Code of 1939 granted an exemption to items sold as ship's stores from the taxes imposed under Chapter 29 of the Internal Revenue Code entitled "Manufacturers' Excise and Import Taxes." No tax was imposed by Chapter 29 on domestically produced bunker fuel whether sold as ship's stores or otherwise. The only tax imposed by chapter 29 which affected bunker fuel was the duty imposed by section 3422 on imported petroleum products. As far as bunker fuel was concerned, therefore, section 3451 did no more than grant an exemption from the tax imposed by section 3422.

Likewise, 19 U.S.C. 1309, being nothing more than a drawback provision relating to duties on imported petroleum, had nothing to do with domestic petroleum.

These two statutory provisions certainly do not constitute a comprehensive pattern of federal regulation of sales of bunker fuels to vessels. There is nothing in those statutes which either expressly or impliedly evidences an intent on the part of Congress to regulate in the area of taxation of sales of domestic bunker fuel. Nor is there any such indication in the case of *McGoldrick v. Gulf Oil Corp., supra.* In that case, the City of New York had imposed a sales tax on the purchaser of bunker fuel. The crude petroleum there involved was *imported* from Venezuela and was maintained in *United States government bonded manufacturing warehouses* where it was refined by the taxpayer into bunker fuel which it sold to vessels engaged in foreign commerce as fuel supplies. The taxpayer contested the validity of the tax. This Court considered the federal statutes exempting fuel supplies from customs duties and the federal statute exempting fuel supplies from the special tax on imported petroleum products and held, that considered together, those statutes evidence Congress' intent to regulate the foreign commerce involved in the importation, production and sale of foreign oil. *The foreign commerce found to be regulated by Congress was not the commerce carried on by the vessels which purchased the bunker fuel as ships' stores but the commerce carried on by the oil companies in bringing in foreign oil for refining in the United States under federal bond.* This Court stated:

> "Respondent rests its argument on different considerations growing out of the control over *the foreign commerce involved in the importation of the oil and its ultimate disposition as ships' stores* of vessels engaged in foreign commerce, which Congress has exercised in pursuance of a national policy with which, it is insisted, the tax conflicts. Expression of

> this policy, it is urged, is to be found in the statutes of the United States, read in light of their legislative history, exempting the imported oil from federal taxation, otherwise imposed, if it is sold for use as fuel on vessels engaged in the foreign trade, and in the measures taken in statutes and regulations to make that policy effective by segregating the oil under the direction of customs officers of the United States from the time of its importation until it is delivered to the purchasing vessel." (309 U.S. 423; Emphasis added.).

See also, 309 U.S. at 426 through 429.

This Court's reference to the Congressional Record for support for its holding that the purpose behind the Congressional provisions granting relief from import duties was to gain back for the oil companies the trade they lost by virtue of the initial enactment of those duties and taxes shows beyond question that the commerce carried on by the oil companies, not the commerce carried on by the vessels which purchased the fuel, was the "commerce" which the Court found Congress intended to regulate.

Once it is recognized that the "foreign commerce" regulated by Congress and discussed by this Court in the *Gulf Oil Corp.* case was the "commerce" engaged in by the oil companies in importing foreign crude oil for production in the United States, it becomes abundantly clear that the *Gulf Oil Corp.* decision is of absolutely no support to appellant in this case. Surely appellant, in producing, refining and selling domestic fuel in California, is not engaged in the "commerce" found to be regulated by Congress in the *Gulf Oil Corp.* case. It is apparent from a reading of the opinion in the *Gulf Oil* case that this Court carefully limited the application of this preemptive ruling

to imported bonded fuel. There is no support therein for appellant's assertion that this Court meant to say that it was holding that *all* types of bunker fuel are to be exempt from *all* state taxation.

CONCLUSION

The foregoing discussion demonstrates that there is no substantial federal question presented by this appeal. Thus, it is respectfully submitted that the appeal should be dismissed or, in the alternative, the decision of the California Supreme Court should be affirmed.

Respectfully submitted,

THOMAS C. LYNCH
Attorney General

JAMES E. SABINE
Assistant Attorney General

ERNEST P. GOODMAN
Assistant Attorney General

JOHN J. KLEE, JR.
Deputy Attorney General

Attorneys for Appellees